Supreme Court, U.S.
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No. 10- 10-57

IN THE

Supreme Court of the United States

BRUCE MARKS and MARKS, LLC
d/b/a MARKS & SOLOKOV, LLC,

Petitioners,

v.

ALFA GROUP a/k/a CROWN FINANCE FOUNDATION,
ALTIMO HOLDINGS & INVESTMENT LTD,
and FINANCIAL DYNAMICS LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Unlike the First, Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuit Courts of Appeal, the Third Circuit does not sustain personal jurisdiction for intentional torts such as defamation which "individually target" forum residents with the *intent* of harming them within the forum under the "effects" test enunciated in *Calder v. Jones*, 465 U.S. 783 (1984) unless (1) the communications are directed to the forum; (2) the communications concern forum related conduct; and/or (3) a "unique relationship" exists between plaintiff's profession and the forum. The Fifth and Sixth Circuit Courts of Appeal also follow the Third Circuit approach.

The minority "effects plus" test (1) fails to take into account technological developments, including the internet and other electronic communications; (2) illogically bases jurisdiction on the content of communications; and (3) creates an unjustified divide between plaintiffs who practice a trade in an industry center, and those who do not. The ultimate result is to deny the forum state's "manifest interest" in providing residents a home (or even U.S.) forum. This is particularly unfair to U.S. residents when foreign defendants use the internet to "individually target" them with the *intent* of imposing harm in the forum, as here. The Court should resolve the Circuit conflict and clarify an "effects" test which addresses internet based torts *intended* to cause harm within the forum. One question is presented:

Does the Due Process Clause of the 14th Amendment to the U.S. Constitution support jurisdiction over defendants who commit intentional torts which "individually target" forum residents with the intent of harming them within the forum, regardless of whether the communications are directed into the forum; the communications concern forum related conduct; and/or a "unique relationship" exists between the plaintiff and the forum, under the "effects" test enunciated in *Calder v. Jones*, 465 U.S. 783 (1984)?

LIST OF PARTIES

Petitioner Bruce S. Marks is an individual. He is the sole member of Petitioner Marks, LLC d/b/a Marks & Sokolov, LLC ("Marks LLC"), which is a limited liability company organized under the laws of Pennsylvania. Respondent Alfa Group a/k/a Crown Finance Foundation ("Alfa/Crown") is organized under the laws of Liechtenstein and the owner of the "Alfa/Crown" companies, including Respondent Altimo Holdings & Investment Ltd, which is organized under the laws of the B.V.I. Respondent Financial Dynamics Ltd. is organized under the laws of England and is the subsidiary of a Maryland company.

CORPORATE DISCLOSURE STATEMENT

Marks, LLC is a limited liability company. It has no parent corporation. It issues no stock. No publicly held company has any ownership interest in Marks, LLC.

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OPINION BELOW

The March 12, 2010 memorandum opinion of the United States Court of Appeals for the Third Circuit that gives rise to this Petition is unreported. It is reprinted in Appendix A hereto ("App. A") at pp. 1a-6a. By order filed on April 5, 2010 the United States Court of Appeals for the Third Circuit denied the petition for panel rehearing and rehearing *en banc*. Appendix B, pp.7a-24a. The memorandum of decision and order dated June 25, 2009 granting the Defendants' motion to dismiss the Complaint under Fed.R.Civ.P. 12(b)(2) have not been published and are attached hereto. Appendix C, pp. 25a-26a.

STATEMENT OF JURISDICTION

The statutory provision for this Court's jurisdiction is 28 U.S.C. § 1254. The United States Court of Appeals for the Third Circuit issued its decision by way of memorandum opinion on March 12, 2010. Panel rehearing and rehearing *en banc* were timely requested. Rehearing was denied on April 5, 2010. Pursuant to Supreme Court Rule 13.1, this Petition was timely filed within 90 days of the panel rehearing denial.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Plaintiff/Petitioner Bruce S. Marks is a Pennsylvania resident and the sole member of Plaintiff/Petitioner Marks, LLC, a law firm which maintains its only office in Philadelphia. A substantial portion of Plaintiffs' practice derives from Russian speakers, including those who do business in Russia and Ukraine.

In 2001, Plaintiffs filed *Norex Petroleum Limited v. Access Industries, Inc. et al.* in U.S. federal court, *inter alia*, against Defendant/Respondent Crown Finance Foundation a/k/a "Alfa Group", a Liechtenstein entity, and its subsidiaries ("Alfa/Crown"). *Norex* accused Alfa/Crown of fraud, bribery, money laundering, and extortion in violation of RICO in relation to the takeover

of an oil company in Russia through corrupted Russian court proceedings. The allegations against Alfa/Crown and its oligarch principal received substantial publicity. The 2007 dismissal of the case for lack of subject matter jurisdiction based on the alleged extraterritorial application of RICO is on appeal before the Second Circuit.

In November, 2008, Alfa/Crown, its subsidiary Defendant/Respondent Altimo Holdings & Investment, Ltd., a BVI company, and their London based public relations firm, Defendant/Respondent Financial Dynamics, Ltd., issued knowingly false press releases, including a memorandum and attachments in English, (collectively, the "Releases") to the media worldwide regarding a dispute with Telenor, a Norwegian company, over Russian and Ukrainian telecommunications assets. The Releases falsely accused Plaintiffs of procuring media articles about Alfa/Crown and Altimo through bribery and attached purportedly emails from and about Marks as "evidence." The allegations and evidence were all fabricated; Plaintiffs had no involvement in the dispute between Alfa/Crown, Altimo, and Telenor; the emails were forged. As Defendants intended, the Releases were published on several websites, accessible worldwide.

As the Third Circuit summarized the Releases:

> Seeking to kill two birds with one stone — to gain the upper hand in the public relations battle [against Telenor] and to extract revenge for the earlier [Norex] lawsuits — Altimo sent a letter to Telenor and distributed

> [the Releases] to the press . . . The [Releases] purported to identify a number of "illegal and inappropriate activities of Telenor" that were directed at Altimo management. ... [The Releases] accused Telenor of engaging in a subversive public relations campaign directed, at least in part, by Marks . . . In addition, the letter attached two fabricated emails to support its accusations, one of which appeared to have been sent by plaintiff Bruce Marks . . .

Id. at 3a.

As the Third Circuit summarized the publication of the Releases:

> The [Release was] circulated to the press and was picked up by three Russian news organizations . . . Those organizations published to the internet articles repeating the allegations that ... Marks had initiated a number of "ordered publications" — publications "obtained through bribery which appear[] as . . . news article[s], usually false, designed to . . . discredit a business competitor or blacken somebody's reputation."

Id. at 3a-4a.

In short, by distributing knowingly false Releases with fabricated emails, Defendants "individually targeted" Plaintiffs for the *sole* purpose of harming them in Pennsylvania in retaliation for filing and litigating

Norex from Philadelphia by falsely accusing them of engaging in illegal conduct, including bribery.

Plaintiffs filed suit, including claims for defamation, in the Eastern District of Pennsylvania where Marks resides and Marks LLC maintains its sole office based on diversity jurisdiction under 28 U.S.C. §1332. Defendants moved to dismiss on various grounds, including lack of personal jurisdiction.

THE DECISIONS BELOW

The district court accepted that "the Releases in issue here were defamatory", "defendants were aware of plaintiffs' offices in Pennsylvania," and "plaintiffs 'have suffered harm in Pennsylvania in the form of damage to their reputations and may lose business and potential business opportunities'". App. B, page 13a. Nevertheless, the court dismissed for lack of personal jurisdiction based on the Due Process Clause of the 14th Amendment, applicable in cases based on diversity jurisdiction, holding that Plaintiffs failed to satisfy the *Calder* "effects" test, as interpreted by the Third Circuit.

Specifically, the court held Plaintiffs did not establish that Defendants "expressly aimed" their conduct at Pennsylvania because the Releases "did not mention plaintiffs' status as residents of Pennsylvania" or "suggest that any of the described wrongdoing had occurred in the Commonwealth." App. B, pp. 20a-21a. The court also noted "there were no allegations that the Releases were specifically directed at Pennsylvania", noting that because "the Releases were disseminated

to the 'media worldwide'" that this "indicates that the comments were directed . . . to a global audience." App. B, page 21a.

In affirming, the Third Circuit held that Plaintiffs did not satisfy the *Calder* "effects" test because (1) Plaintiffs did not allege that "defendants attempted to have their news release published in Pennsylvania"; (2) "Neither the news release nor the articles it spawned refer to Pennsylvania or Marks' practice there"; and (3) "Marks has not alleged that defendants distributed their news releases to specific media organizations based in Pennsylvania." App. A, page 6a. The Third Circuit concluded that Plaintiffs' allegations were "insufficient for a finding that defendants 'expressly aimed' their conduct at the forum," citing Third Circuit precedent. App. A, page 6a.

REASONS FOR GRANTING THE PETITION

This Court should allow the writ because the Third Circuit decision and precedent on which it relies misunderstands *Calder's* interpretation of the Due Process Clause of the 14th Amendment and conflicts with authoritative decisions of seven other Circuits, which sustain personal jurisdiction over defendants who commit intentional torts which "individually target" forum residents with the *intent* of harming them in the forum, regardless of whether (1) communications are directed into the forum; (2) communications concern forum related conduct; and/or (3) a "unique relationship" exists between the plaintiff's profession and the forum. This Court should resolve the conflict between the seven majority Circuits and three minority Circuits.

A state "has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985). Internet technology has changed "modern commercial life," as *Burger King*, 471 U.S. at 476, foreshadowed. The Third Circuit "effects plus" test is out of step with the changes which the worldwide internet has effected and fails to protect U.S. residents from foreign defendants who commit intentional internet based torts *intended* to cause harm within the United States, as occurred here. It hardly violates "traditional conceptions of fair play and substantial justice" to hold defendants responsible in the forum in which they *intentionally* caused harm, *Burger King*, 471 U.S. at 464 (brackets omitted), rather than sending U.S. residents off the to four corners of the world in an attempt to find a forum.

First, the majority Circuits do not require communications to be directed into the forum, recognizing changes in technology no longer require entry into the forum to cause harm; in fact, greater harm is created through the permanency of worldwide publication on the internet compared to "paper" media. Rather, the majority Circuits properly focus on intent and foreseeability of causing harm within the forum.

Second, the majority Circuits do not base jurisdiction on the content of the communications, including a requirement that they describe forum based activity. To do so creates the perverse incentive to fabricate outrageous allegations about non-forum activity in order to impose maximum harm, but to avoid

jurisdiction, as here. A state's interest in providing a forum for its residents is to redress harm; it is irrelevant where the falsely alleged conduct (such as excess drinking in *Calder*) occurred when the harm is suffered in forum.

Third, the majority Circuits do not require a "unique relationship" between the plaintiff's profession and the forum. It makes no sense that jurisdiction can be sustained by the fortuity of whether a plaintiff practices a profession in an industry center, particularly given that most professions or industries (law, accounting, medicine, etc.) do not even have centers.

Here, the justification for adopting an "effects" test to sustain jurisdiction is greater than in *Calder* because Defendants are alleged to have committed an intentional tort with the *intent* to harm Plaintiffs in the forum, unlike *Calder*, where the editor and reporter presumably intended to sell newspapers — the harm to Jones was incidental. In addition, unlike paper publications which are often discarded after reading, internet publication can live forever. Numerous commentators have recognized the importance of clarifying the "effects" test in the internet context.[1]

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1. Teressa Cassidy, *Effects of the "Effects Test": Problems of Personal Jurisdiction and the Internet*, 9 Wyo.L.Rev. 575 (2009); C. Douglas Floyd and Shima Baradarah-Robison, *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 Ind.L.J. 601 (Spring, 2006); Andrew Halaby, *You Won't Be Back: Making Sense of "Express Aiming" After Schwarzenegger*, 37 Ariz.St.L.J. 625 (Summer 2005).

A. *Calder* Supports The "Individually Targeted" Test Over Internet Based Intentional Torts

Calder held "jurisdiction over [defendants] was proper in California based on the 'effects' of their Florida conduct in California" because:

> [P]etitioners are not charged with mere untargeted negligence. Rather, *their intentional, and allegedly tortious, actions were expressly aimed at California.* Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And *they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works* and in which the National Enquirer has its largest circulation. Under the circumstances, petitioners must "reasonably anticipate being haled into court there" to answer for the truth of the statements made in their article . . . *An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California.*

Id., 465 U.S at 789-90 (citations omitted) (emphasis added).

In short, *Calder* held defendants' actions were "expressly aimed" at the forum because (1) Jones lived and worked there, (2) Jones felt the brunt of the harm there, and (3) given the *technology at the time*, the

circulation of the paper in California made it *foreseeable* to defendants that their conduct would harm Jones because California based movie industry decision makers would learn of the allegations she "drank so heavily as to prevent her from fulfilling her professional obligations," *id.* at 789, fn. 9, making her unemployable. Under *Calder*, jurisdiction in this case should have been sustained because Plaintiffs reside in Pennsylvania, they suffered the "brunt of the harm" in Pennsylvania, and Defendants "expressly aimed" at Pennsylvania because they *intended* to harm Plaintiffs there.

B. The "Individually Targeted" Test Adopted By The Majority Circuits Provides An Effective Means Of Addressing Internet Based Intentional Torts

Seven Circuits sustain jurisdiction over defendants who commit intentional torts which "individually target" forum residents with the *intent* of harming them in the forum regardless of where communications are directed, the communications' content, and/or a "unique relationship" exists between the plaintiff's profession and the forum. Three minority circuits have adopted a narrower test.[2] The majority test has repeatedly been used in the internet context.

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2. Plaintiffs have not found Second and D.C. Circuit decisions on point.

1. Early Fourth, Seventh, and Eighth Circuit Decisions Sustain Jurisdiction When Out of Forum Conduct Is *Intended* to Cause Harm to Individually Targeted Residents in the Forum Following *Calder*

First American First, Inc. v. Nat'l Assoc of Bank Women, 802 F.2d 1511 (4th Cir. 1986) reversed dismissal over defendants who circulated defamatory letters outside of plaintiffs' home state throughout the country, with the intent of interfering with plaintiffs' business in the forum. The court sustained jurisdiction because the defendant "knew . . . that its allegedly defamatory letters would inflict the greatest injury upon Leake in the state in which he resided and conducted his business." *Id.* at 1517. The court did not require the letters to describe conduct in the forum or any "unique relationship" between the plaintiffs and the forum.[3]

Dakota Industries, Inc. v. Dakota Sportswear, Inc., 946 F.2d 1384 (8th Cir. 1991), reversed dismissal where plaintiff sued defendant for trademark infringement, holding that *Calder "approved an 'effects test' that allows the assertion of jurisdiction over non-resident*

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3. *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002) affirmed dismissal of claims by a prison warden who oversaw the housing of Connecticut prisoners in Virginia based on allegedly defamatory internet articles because defendants "did not manifest an intent to aim their websites or the posted articles at a Virginia audience." This case, although similar to the minority approach, can be distinguished because there was no allegation that the reporter's intent was to harm the warden. Instantly, Defendants fabricated the allegations about Plaintiffs to harm them in retaliation for *Norex*.

defendants whose acts are performed for the very purpose of having their consequences felt in the forum state." *Id.* at 1390-91 (*quoting Brainerd v. Governors of Univ. of Alberta*, 873 F.2d 1257 (9th Cir. 1989) (emphasis added).

Janmark, Inc. v. Reidy, 132 F.3d 1200, 1202 (7th Cir. 1997) developed an even more lenient test, holding "there can be no serious doubt after *Calder v. Jones* . . . that the state in which the victim of a tort suffers the injury may entertain a suit against the accused tortfeasor."

2. The Ninth Circuit Refines The "Individually Targeted" Test Based On *Calder*

The Ninth Circuit thereafter refined the "individually targeted" test as a means of applying *Calder*'s "expressly aimed" provision, applicable in the internet context and otherwise. *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1321-22 (9th Cir. 1998) affirmed jurisdiction over a defendant whose relevant contact with the forum was posting plaintiff's trademarks on his internet website. Noting there must be "something more" under *Calder* other than knowledge that harm might be suffered in the forum, the court held the wrongful *intent/purpose* to cause harm in the forum closed the gap:

> *Toeppen engaged in a scheme to register Panavision's trademarks as his domain names for the purpose of extorting money from Panavision. His conduct, as he knew it likely would, had the effect of injuring*

> *Panavision in California where Panavision has its principal place of business* . . . Under the "effects test," the purposeful availment requirement necessary for specific, personal jurisdiction is satisfied.

Panavision, 141 F.3d at 1322 (footnote omitted) (emphasis added).

Thereafter, *Bancroft & Masters, Inc. v. Augusta National Inc.*, 223 F.3d 1082 (9th Cir. 2000) upheld jurisdiction over a defendant who sent a letter into Virginia which harmed a known California resident in California by impeding use of a website domain, concluding:

> [*Calder*] cannot stand for the broad proposition that a foreign act with foreseeable effects in the forum state always gives rise to specific jurisdiction. We have said that there must be "something more," but have not spelled out what that something more must be.
>
> We now conclude that "something more" is what the Supreme Court described as "express aiming" at the forum state. *See Calder, 465 U.S. at 789* . . . we deduce that the requirement is satisfied when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state . . . *"express aiming" encompasses wrongful conduct individually targeting a known*

> *forum resident . . . The letter was expressly aimed at California because it individually targeted B&M, a California corporation doing business almost exclusively in California.*

Bancroft, 223 F.3d at 1087-88 (emphasis added).[4]

3. The Tenth and Eleventh Circuits Follow the "Individually Targeted" Test When Out of Forum Communications Are Intended to Cause Harm Within the Forum

Dudnikov v. Chalk & Vermillion Fine Arts, Inc., 514 F.3d 1063 (10th Cir. 2008) reversed dismissal where the defendant sent a "NOCI" communication into California to halt an on-line auction conducted from plaintiff in Colorado, holding:

> [While the communication] formally traveled only to California, it can be fairly characterized as an intended means to the further intended end of cancelling plaintiffs' auction in Colorado. In this way, *it is something like a bank shot in basketball. A player who shoots the ball off of the backboard intends to hit the backboard, but he does so in the service of his further intention of*

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4. *See also Menken v. Emm*, 503 F.3d 1050, 1059 (9th Cir. 2007) ("expressly aimed at the forum state . . . requirement [is] satisfied 'when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state'").

> *putting the ball into the basket. Here, defendants intended to send the NOCI to eBay in California, but they did so with the ultimate purpose of cancelling plaintiffs' auction in Colorado. Their "express aim" thus can be said to have reached into Colorado in much the same way that a basketball player's express aim in shooting off of the backboard is not simply to hit the backboard, but to make a basket . . .*
>
> our case is an easier one than *Calder* itself. There, the defendants intended to write an article, the "focal point" of which was California, for the *Enquirer* to publish and distribute in California. 465 U.S. at 789. Yet, the effects of which the plaintiff complained likely were not bound up in the defendants' intentions. The defendant writer and editor were professionals presumably interested chiefly in the sale of newspapers, not in doing *intentional* harm to Ms. Jones; that is, while they *knew* their article would have adverse effects on her in California, those effects were to them perhaps no more than foreseeable side-effects. . . . *[A]ctions that "are performed for the very purpose of having their consequences felt in the forum state" are more than sufficient to support a finding of purposeful direction under Calder.*

Dudnikov, 514 F.3d at 1077-78 (emphasis added).

Licciardello v. Lovelady, 544 F.3d 1280 (11th Cir. 2008), reversed the denial of jurisdiction where plaintiff alleged defendant infringed his trademarked name and picture on a website, applying *Calder* within the internet setting, holding:

> *The unauthorized use of Carman's mark, therefore, individually targeted Carman in order to misappropriate his name and reputation for commercial gain.* These allegations satisfy the *Calder* effects test for personal jurisdiction — *the commission of an intentional tort, expressly aimed at a specific individual in the forum whose effects were suffered in the forum.*

Licciardello, 544 F.3d at 1288 (emphasis added).

4. The First Circuit Also Sustains Jurisdiction When Out of Forum Conduct is *Designed* to Cause Harm in the Forum Based on *Calder*

In *Northern Laminate Sales, Inc. v. Davis*, 403 F.3d 14, 26 (1st Cir. 2005), Davis made misrepresentations in New York which he knew would be relied upon and cause harm in New Hampshire. Recognizing that the defendant "need not be physically present in the forum state to cause injury", citing *Calder*, the court sustained jurisdiction because of Davis "knowing full well that his statements . . . would likely cause financial injury [in the forum state]."

C. The Third Circuit's Requirements Which Conflict With the Majority Circuits Are Not Supported by *Calder* or The Due Process Clause

IMO Indus., Inc. v. Kieker AG, 155 F.3d 254, 265 (3d Cir. 1998), the Third Circuit's seminal case interpreting the "effects" test in the context of business torts (but not defamation), described *Calder* as follows:

> [T]he Supreme Court relied on three principal findings. First, the defendant committed an intentional tort. Second, the forum was the focal point of the harm suffered by the plaintiff as a result of that tort. Third, the forum was the focal point of the tortious activity in the sense that the tort was "expressly aimed" at the forum. Essential was a corollary finding that the defendants knew that the "brunt" of the injury caused by their tortious acts would be felt by the plaintiff in the forum.

IMO, 155 F.2d at 261.

However, despite this accurate summary of *Calder's* key holding, *IMO* went on to establish a requirement absent in *Calder*, i.e. the plaintiff must "point to contacts which demonstrate that the defendant *expressly aimed* its tortious conduct at the forum, and thereby made the forum the focal point of the tortious activity." *IMO*, 155 F.2d at 265. *IMO* further required that "the defendant must 'manifest behavior intentionally targeted at and focused on' the forum for *Calder* to be satisfied . . . In the typical case, this will require some type of 'entry' into the forum state by the defendant." *IMO*, 155 F.2d at 265 (citations omitted).

Based on *IMO's* reading of *Calder*, *Remick v. Manfredy*, 238 F.3d 248 (3d Cir. 2001) affirmed dismissal for lack of personal jurisdiction of claims by a promoter/attorney based on an allegedly defamatory letter which a boxer circulated within and without Pennsylvania about him. In holding that targeting of Remick for harm was insufficient, *Remick* attempted to distinguish itself from *Calder*:

> Remick has not asserted that Pennsylvania has a unique relationship with the boxing industry, as distinguished from the relationship in *Calder* between California and the motion picture industry . . . Even if the letter itself . . . were distributed or shared with other persons in the professional boxing community, such persons were apparently located throughout the country. Unlike the defendants in *Calder*, whose national magazine is published in California more than any other state and whose story focused on California . . . it cannot be said that the defendants here expressly aimed their conduct at Pennsylvania so that Pennsylvania was the focal point of the tortious activity.

Remick, 238 F.3d at 259.

Thereafter, *Marten v. Godwin*, 499 F.3d 290, 298 (3d Cir. 2007) affirmed dismissal of defamation claims based on a letter circulated outside of the forum, relying on *Remick* which it described as follows:

> plaintiff failed to establish jurisdiction over the defamation claim because plaintiff

> provided "no indication that the [defamatory] letter was targeted at . . . anyone in Pennsylvania other than [plaintiff]," and plaintiff did not assert that Pennsylvania had a "unique relationship" with plaintiff's professional community.

Based on its precedent, the Third Circuit affirmed dismissal instantly. The Fifth and Sixth Circuits have followed this approach. *Revell v. Lidov*, 317 F.3d 467, 473 (5th Cir. 2002) (affirming dismissal because allegedly defamatory article posted on the internet "contains no reference to Texas, nor does it refer to the Texas activities of Revell, and it was not directed at Texas readers as distinguished from readers in other states");[5] *Reynolds v. International Amateur Athletic Federation*, 23 F.3d 1110 (6th Cir. 1994) (holding no jurisdiction because, *inter alia*, the allegedly defamatory press releases did not concern forum activity and the source of the release was from outside the forum).

Respectfully, when defendants commit intentional torts which "individually target" forum residents with the *intent* to cause harm in the forum, there should be no requirement that (1) communications be directed to the forum (or qualification that circulation outside the forum cuts against jurisdiction); (2) communications refer to the plaintiff's forum conduct; and/or (3) a

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5. *Revell* favorably discussed *Remick v. Manfredi*, particularly the requirement that there be a "unique relationship" between the plaintiff's profession and the forum. 317 F.3d at 474.

"unique relationship" exist between the plaintiff's profession and the forum. Such requirements are not supported by *Calder* or the Due Process Clause:

First, there is no reason that communications be directed to the forum if the defendant *intended* to harm the plaintiff in the forum. Internet technology has changed "modern commercial life," as *Burger King*, 471 U.S. at 476, foreshadowed. Mail and faxes are obsolete. Newspapers are folding. Internet publication is more egregious than transmission to forum based "paper" media because it intentionally reaches a broader audience and can be permanent. Like *Calder*, Defendants are not charged with "untargeted negligence". They reached out with the *intent* to harm Plaintiffs in retaliation for U.S. filed litigation by circulating the Releases as widely as possible with the intent that they be published on the internet.

Second, it does not make sense to sustain jurisdiction if a plaintiff is the subject of defamatory allegations regarding forum conduct, but not when the allegations concerns even more defamatory out of forum conduct, such as committing bribery, as here. This merely encourages clever tortfeasors to fabricate defamatory allegations about out-of-forum conduct, while evading jurisdiction. In *Calder*, Jones' harm was suffered by the *nature* of the accusations, not because the alleged excess drinking necessarily occurred in California.

Third, a "unique relationship" between plaintiffs and forums should not be required; this was relevant in *Calder* only to establish the *foreseeability* of harm in

the pre-internet era because industry decision makers in California were likely to read the *National Enquirer*, which was circulated there. This illogically creates two classes of plaintiffs: (1) those who can sustain jurisdiction because they practice their trade in unique industry centers, *i.e.* movie actors in California (but not New York) and investment bankers in New York (but not California); and (2) those who do not, *i.e.* attorneys, accountants, doctors, and everyone else.

Fourth, unless jurisdiction is sustained in this context, American plaintiffs can be left with no United State forum and no remedy. Plaintiffs, a small law firm and its principal, cannot afford an army of solicitors and barristers to litigate in the BVI or England, where Altimo and Financial Dynamics are organized; litigation in Russia where the powerful oligarch controlled Alfa/Crown maintains its home-base and corrupts courts, as alleged in *Norex*, would be fruitless.

Thus, certiorari is warranted to resolve a split between the Circuits which differ on whether personal jurisdiction may be sustained when defendants commit intentional torts which "individually target" forum residents for harm *intended* to be inflicted in the forum, regardless of whether communications are directed to the forum; communications concern forum related conduct; and/or a "unique relationship" exists between the plaintiff's profession and the forum. Adopting a workable "effects" test in the internet context is particularly important as communications are increasingly, if not predominantly, directed through electronic means which do not require entry into the forum to cause harm.

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED MARCH 12, 2010

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 09-2964

BRUCE MARKS and MARKS, LLC d/b/a MARKS & SOLOKOV, LLC,

Appellants

v.

ALFA GROUP a/k/a CROWN FINANCE FOUNDATION, ALTIMO HOLDINGS & INVESTMENT LTD, and FINANCIAL DYNAMICS LTD.

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. No. 2-08-cv-05651)

Submitted Under Third Circuit LAR 34.1(a)
February 11, 2010

(Filed March 12, 2010)

Appendix A

Before: SLOVITER, ROTH and TASHIMA*,
Circuit Judges.

TASHIMA, Circuit Judge.

Appellants Bruce Marks and Marks, LLC d/b/a Marks & Solokov, LLC (together, "Marks"), appeal the District Court's dismissal of their complaint for lack of personal jurisdiction. We will affirm.[1]

I.

This tale of international deception, revenge, and defamation begins in 2001, when Norex Petroleum Limited, a Russian oil company, filed suit against defendant Alfa Group, alleging that Alfa Group had conspired to take control of an oil company owned by Norex in violation of the federal Racketeer Influenced and Corrupt Organizations Act. *See Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146 (2d Cir. 2005). (App. 42 P23; *see also* App. 60-63.) According to the complaint in this matter, which we accept as true for purposes of this appeal, the Norex lawsuit resulted in substantial negative publicity for both Alfa Group and one of its owners. (App. 38 PP2-3; App. 42 PP24-25.)

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* Hon. A. Wallace Tashima , Senior Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

1. The District Court had subject matter jurisdiction under 28 U.S.C. § 1332. We have jurisdiction under 28 U.S.C. § 1291.

Years later, defendant Altimo Holdings & Investment Ltd. ("Altimo"), a company allegedly controlled by Alfa Group, became embroiled in a dispute with Telenor, a Norwegian company, over a Ukranian telecommunications company jointly owned by Altimo and Telenor. *See Storm LLC v. Telenor Mobile Comm'ns AS*, 2006 WL 3735657 (S.D.N.Y. 2006); *Telenor Mobile Comm'ns AS v. Storm LLC*, 524 F. Supp. 2d 332 (S.D.N.Y. 2007). (App. 38 P5; App. 43 PP27-28.) This dispute, which has spawned litigation across the world, led to the defamatory statements at issue here.

Seeking to kill two birds with one stone — to gain the upper hand in the public relations battle and to extract revenge for the earlier lawsuits — Altimo sent a letter to Telenor and distributed copies to the press. (App. 43-46 PP29-41; App. 65-118.) The letter purported to identify a number of "illegal and inappropriate activities of Telenor" that were directed at Altimo management. App. at 67. It accused Telenor of engaging in a subversive public relations campaign directed, at least in part, by Marks. (App. 67.) In addition, the letter attached two fabricated emails to support its accusations, one of which appeared to have been sent by plaintiff Bruce Marks. (App. 77, 89.)

The Altimo letter was circulated to the press and was picked up by three Russian news organizations. (App. 48 P56.) Those organizations published to the internet articles repeating the allegations that at Telenor's request Marks had initiated a number of "ordered publications" — publications "obtained

through bribery which appear[] as . . . news article[s], usually false, designed to . . . discredit a business competitor or blacken somebody's reputation." App. at 268 P6. (App. 123-37.)

Marks subsequently filed this diversity action in the Eastern District of Pennsylvania, seeking damages for defamation, commercial disparagement, intentional interference with prospective contractual relations, intentional infliction of emotional harm, and invasion of privacy, as well as injunctive relief. The district court dismissed the action, finding that it lacked personal jurisdiction over defendants.[2] (App. 1-16.) Marks filed this timely appeal. (App. 18-19.)

II.

Marks bears the burden of establishing that the exercise of personal jurisdiction over defendants would be consistent with the Due Process Clause of the United States Constitution. *Marten v. Godwin,* 499 F.3d 290, 296 (3d Cir. 2007); *see also* 42 Pa. Cons. Stat. Ann. § 5322(b). To meet his burden, Marks relies on the "effects test" from *Calder v. Jones,* 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984). We agree with the district court that Marks has not alleged facts sufficient to warrant the exercise of jurisdiction over defendants in this case.

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2. We review the District Court's dismissal for lack of personal jurisdiction *de novo. Telecordia Tech Inc. v. Telkom SA Ltd.,* 458 F.3d 172, 176 (3d Cir. 2006).

We have consistently emphasized that *Calder* should be applied narrowly. *See, e.g., IMO Indus. v. Kiekert AG,* 155 F.3d 254, 261-65 (3d Cir.1998) (agreeing with "[t]he majority of our sister circuits that [a narrow construction is most appropriate for] the application of *Calder* to business torts"); *Marten,* 499 F.3d at 297 (stating that, because "the effects test and traditional specific jurisdiction analysis . . . are cut from the same cloth, . . . the effects test prevents a defendant from being haled into a jurisdiction solely because the defendant intentionally caused harm that was felt in the forum state"). At a minimum, Marks must allege facts that establish that defendants "expressly aimed" their conduct at Pennsylvania. *Marten,* 499 F.3d at 297; *IMO,* 155 F.3d at 265-66.

Marks' allegations on this point are insufficient. He alleges nothing more than that defendants knew he practiced law in Pennsylvania when they released the letter to the media. Knowledge of where an individual resides, however, is insufficient to establish jurisdiction, even with an intentional tort. *Marten,* 499 F.3d at 299 ("Marten has alleged only that defendants harmed him while he happened to be residing in Pennsylvania."); *IMO,* 155 F.3d at 266 ("While knowledge that the plaintiff is located in the forum is necessary to the application of *Calder,* . . . it alone is insufficient to satisfy the targeting prong of the effects test.").

The factual allegations in Marks' complaint do not support Marks' conclusory allegations that defendants aimed their conduct at Pennsylvania. Marks does not

allege that defendants attempted to have their news release published in Pennsylvania. Neither the news release nor the articles it spawned refer to Pennsylvania or Marks' practice there. Marks has not alleged that defendants distributed their news release to specific media organizations based in Pennsylvania. To the contrary, the articles were published only by Russian news organizations in the Russian language. *Cf. Noonan v. Winston Co.*, 135 F.3d 85, 91 (1st Cir. 1998) (noting fact that published material was in French suggested it was intended for a French audience). This is insufficient for a finding that defendants "expressly aimed" their conduct at the forum. *Marten*, 499 F.3d at 299; *IMO*, 155 F.3d at 266-68; *Remick v. Manfredy*, 238 F.3d 248 (3d Cir.2001); *see also Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002).

III.

For the above-stated reasons, we will affirm the judgment of the District Court dismissing this case for lack of personal jurisdiction.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED JUNE 25, 2009

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

CIVIL ACTION

NO. 08-5651

BRUCE S. MARKS, et al.

v.

ALFA GROUP, et al.

MEMORANDUM

Bartle, C.J. June 25, 2009

Plaintiffs Bruce S. Marks and Marks, LLC, doing business as Marks & Sokolov, LLC, initiated this diversity action against three foreign defendants: Altimo Holdings & Investments Ltd. ("Altimo"), a holding company organized under the laws of the British Virgin Islands; Crown Finance Foundation ("Crown"), a holding company organized under the laws of the Principality of Liechtenstein and incorrectly identified for docketing purposes as "Alfa Group"; and Financial Dynamics, Ltd. ("Financial"), a London-based "business communications consultancy" incorporated under the laws of England and Wales. The complaint alleges: (1) common law defamation;

(2) statutory defamation under Pennsylvania law; (3) injurious falsehood; (4) commercial disparagement; (5) intentional interference with prospective contractual relations; (6) intentional infliction of emotional harm; (7) invasion of privacy; and (8) injunctive relief. Plaintiffs also seek monetary relief, including punitive and special damages.

Before us is the motion of all defendants under Rules 12(b)(2) and (6) of the Federal Rules of Civil Procedure to dismiss for lack of personal jurisdiction and failure to state a claim upon which relief can be granted.

I.

When a defendant moves to dismiss claims under Rule 12(b)(2), the plaintiff bears the burden of showing that personal jurisdiction exists. *See Marten v. Godwin*, 499 F.3d 290, 295-96 (3d Cir. 2007). At this stage the plaintiff must establish only "a prima facie case of personal jurisdiction" and is entitled to have his allegations taken as true and all factual disputes drawn in his favor. *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 97 (3d Cir. 2004).[1] Nonetheless, the plaintiff must allege "specific facts" rather than vague or conclusory assertions. *Marten*, 499 F.3d at 298.

---

1. The court may later revisit the issue, at which point the plaintiff must produce competent evidence sufficient to establish the existence of jurisdiction by a preponderance of the evidence. *Carteret Sav. Bank, FA v. Shushan*, 954 F.2d 141, 142 n.1 (3d Cir. 1992).

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II.

Plaintiff Bruce Marks is a citizen of Pennsylvania. He is the sole partner in plaintiff Marks, LLC, a Philadelphia law firm with seven attorneys. Together with MS Ltd., a Moscow law firm with six attorneys, and MSB, Ltd., which maintains an office in Kiev with three attorneys, Marks, LLC does business under the moniker Marks & Sokolov, LLC. Their practice focuses in part on "representing persons harmed by fraud or corruption in Russia and Ukraine by finding means to bring their claims in the United States." As a result, they have filed numerous cases against "Russian and Ukrainian criminal and business groups, including many powerful oligarchs . . . ."

Defendants, as noted above, are foreign corporate entities. None maintains offices, owns real property, or conducts business in Pennsylvania.

Defendants Altimo and Crown have been involved in a prolonged dispute with Telenor, a Norwegian company, over ownership and control of a pair of telecommunications companies. On November 12, 2008, Altimo sent a one-page open letter written by its chairman, Andrei Kosogov, to Telenor, accompanied by a three-page summary memorandum and twelve attachments (together, "the Releases"). In the letter, Kosogov requested that Telenor investigate "a wide range of documentary evidence . . . which suggests there has been questionable activity directed at Altimo and

the members of its International Advisory Board." Kosogov wrote:

> A network of legal firms and public affairs agencies in Russia and the UK appear to have undertaken black PR campaigns in the media to try to discredit Altimo, its parent company Alfa Group, and its shareholders involving methods such as payments to journalists and newspapers for the publication of information
> . . . .

The accompanying memorandum, under the heading "Illegal and inappropriate activities of Telenor management against Altimo," asserts in pertinent part that:

> Altimo has recently discovered a number of documents which indicate that various acts of inappropriate and illegal behaviour might have been used by the current management of Telenor and companies hired by Telenor. . . .
>
> The network of firms which appear from the evidence as working on behalf of Telenor include:
>
> Garda World and Hakluyt, two UK-based companies who directed both detective investigations and PR campaigns against Altimo. The former has been instructed by

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> Marks & Sokolov, a legal company operating in the UK, U.S. and Russia.
>
> PBN, an American PR-agent and lobbyist based in Moscow.
>
> Lobbynet, a Russian firm notoriously known for 'black' PR campaigns in the local media.

The memorandum further stated:

> In late March 2008, Marks & Sokolov initiated a number of paid publications in the Russian media to discredit Altimo, Alfa Group and their shareholders. The campaign was directed through Garda World and managed in Russia by Lobbynet. The publications concerned the sudden death of Leonid Rozhetskin, a Russian businessman previously involved in the Megafon affair, and speculated about Alfa's involvement in the plot. As a result, three paid for articles appeared in Russian tabloid publications between 02 and 07 April, all discrediting Altimo and Alfa Group.

Among the twelve attachments to the letter was an email dated April 10, 2008, purportedly authored by plaintiff Bruce Marks and addressed to a "garda-world.com" email address. The email stated:

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> Craig:
>
> I am not impressed with Lobbynet's PR attempts in Russia. Their three articles to date have clearly not had the desired impact. It is obvious that they have chosen media which lacks both integrity and the ability to impact.
>
> Please inform them that I will withhold payment as per our original contract until I see some positive results and show them to Telenor.
>
> I wait to hear how they intend to rectify the situation.

Also attached was an email dated August 28, 2008, purportedly from Stuart Lessor of PBN Co., which stated in part:

> Alfa proactively used AB to a) get lobbying contacts in UK and elsewhere; (b) as shield against media accusations; c) as link to investment banks. They never work, but their names do. As you are well aware, Bruce reports XX is also impressed by the composition of the AB, apparently acquainted with one of its U.S. fellows.

Defendant Financial, on behalf of Crown and Altimo, distributed copies of the Releases to "media worldwide" on November 12, 2008, the same day they were sent to

Telenor. On the following day, an article entitled "Alfa Group is possessed by spy mania" (the "Article") was published by three globally-accessible Russian media websites. Written in the Russian language and Cyrillic alphabet, the Article as translated into English referenced plaintiffs as follows:

> Altimo confirms that in March of 2008 the law firm of Marks and Sokolov at Telenor's request initiated a number of publications in Russian mass media concerning the death of one of the founders of a mobile operator Megafon, Leonid Rozhetskin who disappeared in March of 2008 and possible Alfa Group's involvement [sic] in this matter.

According to plaintiffs, all representations concerning them in the Releases and the Article are entirely false. As a result, they "have suffered harm in Pennsylvania in the form of damage to their reputations and may lose business and potential business opportunities; in addition, Marks has suffered emotional distress, mental anguish, and humiliation in Pennsylvania." Plaintiffs now theorize that defendants circulated the defamatory Releases in retaliation for plaintiffs' participation in *Norex Petroleum Limited v. Access Industries, Inc., et al.*, Civ. A. No. 02-1499 (S.D.N.Y.), an ongoing case in which the plaintiff, Norex, is represented by Marks & Sokolov. Norex alleges that the defendants, who include Crown, conspired to take control of an oil company owned by Norex in Russia through fraud, corruption of court proceedings, bribery,

money laundering, and extortion. The lawsuit was dismissed for lack of subject matter jurisdiction in 2007 and is currently on appeal.

III.

A federal district court sitting in diversity may assert personal jurisdiction over a nonresident of the state in which the court sits only to the extent authorized by the law of that state. Fed. R. Civ. P. 4(k)(1)(A). Pennsylvania law provides for jurisdiction coextensive with that allowed by the Due Process Clause of the Constitution. 42 Pa. Cons. Stat. Ann. § 5322(b). As a result, we must determine whether an exercise of personal jurisdiction comports with federal law.

Two bases exist upon which a federal district court may exercise personal jurisdiction over a nonresident defendant: "General jurisdiction exists when a defendant has maintained systematic and continuous contacts with the forum state. Specific jurisdiction exists when the claim arises from or relates to conduct purposely directed at the forum state." *Marten*, 499 F.3d at 296 (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-15, 104 S. Ct. 1868, 80 L. Ed. 2d 404 nn.8-9 (1984)). The complaint does not allege that defendants maintain systematic and continuous contacts with the forum state, Pennsylvania. Thus, we clearly lack general jurisdiction over them.

Under the Due Process Clause, we may exercise specific jurisdiction only over defendants who have

"certain minimum contacts . . . such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945) (internal quotation omitted). A parallel inquiry is whether the defendant's contacts with the forum state are such that "he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980).

In *Calder v. Jones*, the Supreme Court addressed whether a court could exercise specific personal jurisdiction over non-resident defendants charged with commission of intentional torts whose effects were felt in the forum state. 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984). The plaintiff, an actress residing in California, had brought a defamation suit in California state court against a tabloid editor and reporter, both citizens of Florida and employees of the *National Enquirer*, a Florida corporation. The Court emphasized that: (1) the story "concerned the California activities of a California resident," (2) it "was drawn from California sources," (3) the brunt of the harm to plaintiff's reputation was suffered in California, and (4) the *National Enquirer* had its largest circulation in California. *Id.* at 788-90. On that basis it concluded that "California is the focal point both of the [allegedly defamatory] story and of the harm suffered." *Id.* at 789. As a result, the exercise of personal jurisdiction over defendants was consistent with due process.

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Our Court of Appeals expounded upon *Calder* in *IMO Indus., Inc. v. Kiekert AG*, a case in which IMO, a multinational corporation located in New Jersey, sued Kiekert, a German corporation, in New Jersey district court. 155 F.3d 254 (3d Cir. 1998). The complaint alleged that Kiekert had committed a variety of business torts while attempting to prevent the sale of IMO's Italian subsidiary to one of Kiekert's competitors in France. Specifically, Kiekert had sent letters threatening legal action to an IMO affiliate in New York, which were subsequently sent to IMO in New Jersey. Kiekert had also made similar representations during telephone calls placed by IMO in New Jersey. IMO further established that Kiekert was aware of the fact that any damages caused by a collapse of the deal would be felt primarily by IMO in New Jersey.

Judge Becker, writing for the court, rejected the contention that *Calder* permitted jurisdiction simply because "the harm caused by the defendant's intentional tort is primarily felt within the forum." *Id.* at 265. Instead, he formulated the *Calder* test as requiring that:

> (1) the defendant committed an intentional tort;
>
> (2) the plaintiff felt the brunt of the harm in the forum such that the forum can be said to be the focal point of the harm suffered by the plaintiff as a result of that tort; and

> (3) the defendant expressly aimed his tortious conduct at the forum such that the forum can be said to be the focal point of the tortious activity.

Id. at 265-66. Applying that test, the court concluded that although some of Kiekert's communications had foreseeably reached IMO in New Jersey, and the harm had been suffered there, those facts alone were "not sufficient to overcome the clear implication from the surrounding facts that New Jersey was not the focus of the dispute." *Id.* at 268. Consequently, because Kiekert had not "expressly aimed its tortious conduct at the forum," jurisdiction did not lie. *Id.*

Our Court of Appeals recently confirmed that the same rigorous standard applies to defamation suits in *Marten v. Godwin.* 499 F.3d 290 (3d Cir. 2007). The plaintiff, Marten, a resident of Pennsylvania, was a former participant in an internet-based correspondence degree program offered by the University of Kansas. He had been accused of plagiarism by two of his professors, both residents of Kansas, and subsequently expelled. Marten brought suit in this district, alleging that the accusations against him constituted defamation under state law. Defendants, who had not made statements or sent materials to anyone in Pennsylvania other than Marten himself, moved to dismiss for lack of personal jurisdiction. After discovery, the district court granted summary judgment in favor of the defendants on that basis.

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For purposes of review the Court of Appeals treated the allegations of Marten's complaint as true and considered the case as having been dismissed pursuant to Rule 12(b)(2). *Id.* at 295 n.2. The court accepted Marten's allegations that the defendants knew he was a resident of Pennsylvania and knew that the brunt of the harm to his reputation from a wrongful allegation of plagiarism would occur in Pennsylvania. It concluded, however, that Marten had not alleged the "specific facts" or "specific activity" showing a "deliberate targeting" of the forum state. *Id.* at 298 (citing *IMO*, 155 F.3d at 266). The panel observed as follows:

> The effects test and traditional specific jurisdiction analysis are different, but they are cut from the same cloth. Just as the standard test prevents a defendant from being haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, the effects test prevents a defendant from being haled into a jurisdiction solely because the defendant intentionally caused harm that was felt in the forum state if the defendant did not expressly aim his conduct at that state.

Id. at 297 (internal quotations and citations omitted). On the facts alleged, Marten had shown "only that defendants harmed him while he happened to be residing in Pennsylvania." *Id.* at 299; *see also Remick v. Manfredy*, 238 F.3d 248 (3d Cir. 2001). The court affirmed the dismissal of Marten's suit on the basis of lack of personal jurisdiction.

District courts have likewise dismissed defamation claims for failure to satisfy the effects test, including where, as here, the situation is complicated by "the added wrinkle of the internet." *Gorman v. Jacobs*, 597 F. Supp. 2d 541, 547 (E.D. Pa. 2009). In *Gorman*, the plaintiff, a podiatrist practicing in Pennsylvania, sued three fellow doctors, non-residents of Pennsylvania, for defamation based on their comments on an online forum that was accessible to the general public. The defendants had encouraged readers to report the plaintiff's alleged ethical violations to Pennsylvania-based and national medical associations. *Id.* at 543.

Addressing defendants' Rule 12(b)(2) motion, Judge Dalzell concluded that the defendants had directed their comments at a national audience rather than a local one. *Id.* at 549-51; *see also English Sports Betting, Inc. v. Tostigan*, Civ. A. No. 01-2202, 2002 U.S. Dist. LEXIS 4985, 2002 WL 461592, at *3 (E.D. Pa. Mar. 15, 2002). He observed that "[s]imply (a) knowing that the plaintiff is in the forum state, (b) posting negative statements about the plaintiff's forum-related activities, and (c) referring to the forum in one's writing will not suffice to satisfy the *Calder* effects test." *Id.* at 548. Because the plaintiff had failed to show that the defendants had expressly aimed their comments into the forum of Pennsylvania, the case was dismissed.[2]

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2. Notable appellate decisions from other circuits have produced similar results. *See Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002); *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002).

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For present purposes, we accept as true that the Releases in issue here were defamatory and that defendants distributed those materials to "media worldwide." We also assume based on plaintiffs' complaint that defendants were aware of plaintiffs' offices in Pennsylvania, Russia, and the Ukraine, and of plaintiffs' substantial client base in Russia. Finally, we credit the assertion that plaintiffs "have suffered harm in Pennsylvania in the form of damage to their reputations and may lose business and potential business opportunities."

The first *Calder* element will always be satisfied in cases where, as here, the plaintiff sufficiently alleges that the defendant committed an intentional tort. Before considering the second element, however, we are instructed to determine whether the plaintiff has satisfied the third element, which requires that the defendant "expressly aimed" defendant's tortious conduct at the forum state. *Id.* at 266.

There is no question that the Releases in issue here had no readily apparent connection with Pennsylvania. They summarized the purported wrongdoing orchestrated by Telenor, a Norwegian company, against defendant Altimo, a holding company incorporated in the British Virgin Islands and having business interests in Russia. Although the documents implicated plaintiffs in Telenor's wrongdoing, they did not mention plaintiffs' status as residents of Pennsylvania and instead described Marks & Sokolov as "a legal company operating in the UK, U.S. and Russia." Nor did the

Releases suggest that any of the described wrongdoing had occurred in the Commonwealth. To the contrary, they stated that Marks & Sokolov had "initiated a number of publications in Russian mass media."

There are also no allegations that the Releases were specifically directed at Pennsylvania through the method by which they were distributed. In plaintiffs' own words, the Releases were disseminated to "media worldwide," which indicates that the comments were directed, if anywhere, to a global audience. As noted earlier, the district court in *Gorman* found that that fact alone warranted dismissal of the complaint for lack of personal jurisdiction. 597 F. Supp. 2d at 549-51; *see also English Sports Betting, Inc.*, 2002 U.S. Dist. LEXIS 4985, 2002 WL 461592, at *3.

The Releases were later summarized in an Article carried by three Russian media websites which again did not mention Pennsylvania. Although the relevant websites were technically accessible in Pennsylvania, those sites and the Article itself were written in the Russian language using the Cyrillic alphabet. Our Court of Appeals has recognized that when a publication is written entirely in a foreign language, it weighs heavily against a finding that the author intended to aim that content at an American audience. *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 454 (3d Cir. 2003); *see also Noonan v. Winston Co.*, 135 F.3d 85, 91 (1st Cir. 1998). On these facts it is plain that, as in *IMO*, "the focus of the dispute" is overseas, rather than in Pennsylvania, the forum state. 155 F.3d at 268.

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Plaintiffs cite *Dudnikov v. Chalk & Vermilion Fine Arts.*, 514 F.3d 1063 (10th Cir. 2008), for the proposition that personal jurisdiction exists here. In that case, the defendants had disrupted a Colorado plaintiff's internet auction by filing a complaint in California with eBay, the auction website's proprietor. Applying the effects test, the panel found sufficient evidence that "[d]efendants' express aim in acting was to halt a Colorado-based sale by a Colorado resident," and consequently, "neither the lack of defendants' physical presence in Colorado nor the fact that they used a California-based entity to effectuate this purpose" precluded an exercise of jurisdiction. *Id.* at 1076. Plaintiffs argue that as in *Dudnikov*, defendants here simply aimed an intentional tort at the forum state in a roundabout manner.

Even assuming our Court of Appeals would adopt the reasoning of *Dudnikov*, that decision is inapposite. The sole effect of the action taken by the *Dudnikov* defendants in California was to interfere with the plaintiff's auction in Colorado. The defendants had thereby aimed their conduct into Colorado, which is where the heart of the dispute, the contested eBay auction, was in fact taking place. Here, by contrast, plaintiffs allege only that defendants intended "to achieve publication in Russian speaking media accessible to Pennsylvania and the world in order to destroy Plaintiffs' Pennsylvania based practice which relates to Russia and Ukraine." That allegation merely assumes the fact to be proved. It is not an allegation of "specific activity" or "specific fact" showing a "deliberate targeting" of plaintiffs' Pennsylvania office as opposed

to their law offices in Russia and the Ukraine. *IMO*, 155 F.3d at 266; *Marten*, 499 F.3d at 298. Nor have plaintiffs included any other suitably precise allegations in their complaint which demonstrate that defendants expressly aimed their conduct at Pennsylvania, a forum some 4,700 miles away.

As in *IMO*, *Marten*, and *Gorman*, plaintiffs have failed to satisfy the third element of the *Calder* test. As a result, they have not carried their burden of demonstrating that sufficient minimum contacts exist for us to exercise specific jurisdiction over defendants. *Burger King Corp.*, 471 U.S. at 474. Accordingly, we will grant the motion of defendants to dismiss the complaint in its entirety for lack of personal jurisdiction under Rule 12(b)(2) of the Federal Rules of Civil Procedure. We do not reach the question whether the complaint fails to state a claim upon which relief can be granted.

Appendix B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

CIVIL ACTION

NO. 08-5651

BRUCE S. MARKS, et al.

v.

ALFA GROUP, et al.

ORDER

AND NOW, this 25th day of June, 2009, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the motion of defendants Altimo Holdings & Investments Ltd., Crown Finance Foundation, and Financial Dynamics, Ltd., to dismiss the complaint under Rule 12(b)(2) of the Federal Rules of Civil Procedure is GRANTED; and

(2) the complaint of plaintiffs Bruce S. Marks and Marks, LLC, doing business as Marks & Sokolov, LLC, is DISMISSED for lack of personal jurisdiction.

BY THE COURT:

/s/ Harvey Bartle III
C.J.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING FILED APRIL 5, 2010

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 09-2964

BRUCE S. MARKS; MARKS, LLC, d/b/a MARKS & SOKOLOV, LLC,

Appellants

v.

ALFA GROUP, a/k/a CROWN FINANCE FOUNDATION; ALTIMO HOLDINGS & INVESTMENT LTD; FINANCIAL DYNAMICS LTD

SUR PETITION FOR REHEARING

Present: SCIRICA, *Chief Judge,* SLOVITER, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, ROTH,* and TASHIMA,** *Circuit Judges*

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* Hon. Jane R. Roth, Senior Circuit Judge, as to panel rehearing only.

** Hon. A. Wallace Tashima, Senior Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation, as to panel rehearing only.

Appendix C

The petition for rehearing filed by Appellants Bruce S. Marks; Marks, LLC, d/b/a Marks & Sokolov, LLC, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en bane, the petition for rehearing is denied.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: April 5, 2010